UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	**Civil Action No. H-01-3624 (Consolidated)**
Plaintiffs,	§	**CLASS ACTION**
v.	§	
ENRON CORP., et al.,	§	
Defendants.	§	

DEFENDANT KENNETH L. LAY'S BRIEF IN OPPOSITION TO AMALGAMATED BANK'S AND REGENTS' MOTION FOR PARTICULARIZED EXPEDITED DISCOVERY FROM CERTAIN ENRON EXECUTIVES

Defendant Kenneth L. Lay submits the following brief in opposition to Amalgamated Bank's and Regents' Motion for Particularized Expedited Discovery from Certain Enron Executives:

INTRODUCTION

Regents of the University of California and Amalgamated Bank ("Plaintiffs") request that the Court lift the PSLRA's discovery stay to permit them to depose Defendant Kenneth Lay about alleged document destruction on the 19th floor of Enron's headquarters. They claim that his deposition is necessary "[t]o protect Plaintiffs from undue prejudice and to preserve relevant evidence." Memorandum in Support of Amalgamated Bank's and Regents' Motion for Particularized Expedited Discovery from Certain Executives ("Plaintiffs' Memorandum"), p. 2. Yet, Plaintiffs present no evidence that Mr. Lay knew about or authorized any destruction of evidence at Enron's headquarters. Nor do they present any competent evidence, for that matter, of destruction of

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documents at Enron.[1] Thus, it is entirely speculative for Plaintiffs to contend that Mr. Lay might know something that might shed light on the destruction of documents at Enron.

But more to the point, the two exceptions to the PSLRA's discovery stay speak prospectively in terms of *preventing* undue prejudice and *preserving* relevant evidence. 15 U.S.C. § 78u-4(b)(3)(B). Counsel for Enron informed this Court at the January 22, 2002, hearing that FBI personnel had been dispatched to the Enron building to secure Enron's documents and to conduct an investigation into the alleged document destruction. Transcript of Injunction Hearing, January 22, 2002, p. 61. At a hearing before this Court on January 30, 2002, counsel for Enron also brought to this Court's attention an order of the Bankruptcy Court signed on January 25, 2002 enjoining Enron and its employees from destroying documents. Transcript of Motion Hearing, January 30, 2002, p. 37. Mr. Lay has not even been employed by Enron since January 23, 2002. With the evidence secured and with the Justice Department conducting an investigation into the "who, what, when, where and how of Enron's [alleged] document destruction," it is impossible to discern how Mr. Lay's deposition could conceivably be necessary to protect Plaintiffs from undue prejudice or to preserve relevant evidence. Plaintiffs' Memorandum, p. 2.

ARGUMENT AND AUTHORITIES

On January 22, 2002, Plaintiffs' counsel brought into the courtroom a box of shredded documents. They also submitted a Declaration from G. Paul Howes, another attorney with the law firm representing Plaintiffs. In the Declaration, Mr. Howes asserts: "Backed by a team of

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[1] This Court only knows that Plaintiffs' counsel walked into its courtroom with a box of shredded documents without any first-hand knowledge of where the documents came from, what they were, or how and when they were shredded.

investigators, forensics accountants, and lawyers, we have conducted hundreds of contacts and interviews over the last 12 weeks, during which I have spent several hours on the phone and in person with an Enron project manager, Maureen Raymond Castaneda, who was laid off in mid-January." Despite these hundreds of contacts and interviews, Plaintiffs' counsel have not submitted to the Court a single affidavit from anyone who could testify based on first-hand knowledge to the destruction of documents at Enron. Plaintiffs have not even submitted an affidavit from Ms. Castaneda, who supposedly obtained the box of shredded documents brought into this courtroom.[2] Nor has a single one of these potential witnesses sworn on personal knowledge that Mr. Lay had any involvement whatsoever in any shredding of documents at Enron. The other documentation submitted by Plaintiffs consists of various newspaper articles which, in turn, contain multiple layers of hearsay and speculation, and three pages excerpted from the 203-page Powers Report. None of Plaintiffs' so-called evidence -- despite its wide-ranging reliance on hearsay and speculation -- remotely suggests that Mr. Lay had any involvement in any document shredding at Enron.

Plaintiffs' rationale for deposing Mr. Lay is:

> [He] worked on the 19th floor of Enron's Houston headquarters in the corporate accounting area where the shredding has occurred, and/or supervised those assigned

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[2] Presentation of evidence by sworn affidavit or declaration made on first-hand knowledge is not a mere formality. First, the Federal Rules require it. FED. R. EVID 602; *Richardson v. Oldham*, 12 F.3d 1373, 1378-79 (5th Cir. 1994) (court should give no weight to portions of an affidavit that are not based on personal knowledge). Second, it is much more helpful for the Court to receive testimony from a witness rather than an advocate. *See Inglett & Co. v. Everglades Fertilizer Co.*, 225 F.2d 342, 349 (5th Cir. 1958) (it is an inherently unsound practice to have affidavits in support of summary judgment prepared and sworn to by counsel). Ms. Castaneda reported to the press, inconsistently, that she took the box of shredded documents home to use as packing material and that she collected the box at the suggestion of Mr. Howes. Mr. Howes' Declaration merely states, with "perfect" ambiguity, that Ms. Castaneda "knew that the shredded document *could* be used to pack delicate personal goods" and that she delivered the box to him, sidestepping whether he asked her to retrieve the box from Enron and whether she actually took it home for packing material. Howes' Declaration, p. 4 (emphasis added). Perhaps an affidavit from Ms. Castaneda could clear up this confusion, as well as provide the Court with some guidance as to what was actually in the box.

> to the shredding on the 19th floor, or had direct or overall responsibility for maintaining internal controls in the corporate accounting and finance department. Thus, [he] likely know[s] the who, what, when, where and how concerning the document destruction.

Plaintiffs' Memorandum, p. 8. As noted above, Plaintiffs submit no evidence to support these assertions. In fact, Mr. Lay did not work on the 19th floor of Enron's Houston headquarters in the corporate accounting area. He did not supervise those who generally handled document shredding on the 19th floor -- indeed, it is difficult to understand how Plaintiffs can make this assertion as to anyone in light of the fact that they fail to identify who, in fact, did the alleged shredding on the 19th floor. Mr. Lay did not have direct responsibility for maintaining internal controls in the corporate accounting and finance department. Plaintiffs must then be seeking to take his deposition on the basis that he had "overall" responsibility for maintaining internal controls in the corporate accounting and finance department. If "overall" is given broad enough scope, the net cast by Plaintiffs goes far and wide into Enron's executive ranks. Moreover, it is sheer speculation that someone with "overall" responsibility would, as Plaintiffs contend, "likely know the who, what, when, where and how concerning the [alleged] document destruction."

Disregarding their burden to justify lifting the stay, Plaintiffs argue that Mr. Lay should not mind being deposed because he is not employed anyway and directors' and officers' insurance will pay for him to submit to discovery. Plaintiffs' Memorandum, pp. 6, 7 n. 2.[3] Plaintiffs thus ask this Court to reverse the burden for lifting the PSLRA's discovery stay, insisting that they should be entitled to the discovery they seek unless Mr. Lay can demonstrate that it would be burdensome to

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[3] As usual, Plaintiffs submit no evidence to substantiate this assertion. Nor is the burden of discovery limited to its expense.

him. Nothing in the PSLRA or the cases cited by Plaintiffs relieves them of the burden of demonstrating that the discovery sought by them is justified by one of the two exceptions to the stay. That burden is not changed or lessened in any way by the perceived hardship a party may suffer from the proposed discovery. Simply put, if Plaintiffs cannot demonstrate that an exception applies, they are not entitled to discovery.

Congress specifically provided that the mandatory discovery stay may only be lifted where particularized discovery is necessary: (1) to preserve evidence; or (2) to prevent undue prejudice. 15 U.S.C. § 78u-4(b)(3)(B).[4] Conclusory concerns that evidence would be lost or destroyed are insufficient to meet the preservation of evidence exception. *In re CFS-Related Securities Litigation*, No. 99-CV-825KJ, 2001 WL 1682815 at *3 (N.D. Okla. Dec. 27, 2001). *See also In re Fluor Corp. Sec. Litig.*, No. SA CV 97-734 AHS EEX, 1999 WL 817206, at *3 (C.D. Calif. Jan. 15, 1999) (plaintiffs failed to make any showing that discovery was necessary to preserve evidence beyond generalized allegations of possible loss or destruction); *Novak v. Kasaks*, No. 96 Civ. 3073 (AGS), 1996 WL 467534, at *1 (S.D.N.Y. Aug. 16, 1996) (plaintiffs failed to satisfy their burden of showing that exceptional circumstances existed justifying a lifting of the discovery stay because they provided no evidence to bolster their wholly speculative assertions about the risk that evidence would be lost or destroyed). As was the case in *In re CFS-Related Securities Litigation*, Plaintiffs here fail to "demonstrate a specific instance in which the loss of evidence is imminent as opposed to merely

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[4] Although Plaintiffs refer to the undue prejudice exception, they fail to make any such showing. Courts have found undue prejudice when it has been shown that defendants will be shielded from liability in the absence of the discovery. *See, e.g., Vacold LLC v. Cerami*, No. 00 Civ. 4024 (AGS), 2001 WL 167704, at *7 (S.D.N.Y. Feb. 16, 2001). Plaintiffs have not remotely made any showing that Mr. Lay will be shielded from liability if his deposition is not taken.

speculative." *CFS* at *3. Without such a showing, Plaintiffs' request to depose Mr. Lay is nothing more than a "fishing expedition", prohibited by the PSLRA. H.R. Conf. Rep. No. 104-369, at 37 (1995).

The cases cited by Plaintiffs in support of their contention that "courts allow varying forms of particularized discovery 'when faced with the 'risk of lost or destroyed evidence'" are clearly distinguishable. The district court in *In re Pacific Gateway Exchange, Inc.*, No. C-00-1211, 2001 WL 1334747 (N.D. Cal. Oct. 17, 2001), granted a request for particularized discovery only after a showing that the loss of electronic data was imminent due to the sale of various company computers. Moreover, the court only allowed discovery designed to preserve the information that the plaintiffs had clearly shown was at imminent risk of loss. *Vezzetti v. Remec, Inc.*, No. 99-CV-0796-L, 2001 U.S. Dist. LEXIS 10462 (S.D. Cal. July 20, 2001) and *In re Flir Systems, Inc. Securities Litigation*, No. 00-360-HA, 2000 WL 33201904 (D. Or. Dec. 13, 2000) both involved discovery requests directed solely at *non-party third persons* to ensure that they would preserve evidence in accordance with the PSLRA's mandate. Once again, the court's concern was to preserve evidence prospectively. In view of the actions by the FBI and the bankruptcy court to preserve evidence at Enron, that concern is not present here. Moreover, Plaintiffs do not explain, and cannot explain, how taking Mr. Lay's deposition is necessary to preserve evidence going forward.

CONCLUSION

Plaintiffs' request to take Mr. Lay's deposition is nothing more than a tactical maneuver designed to harass Mr. Lay, with no conceivable legitimate purpose contemplated by the PSLRA or otherwise. It should be summarily denied by this Court.

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Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 5, Federal Rules of Civil Procedure, on this 8th day of March, 2002.

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